BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

WETONA M. NEISZ	)	
Claimant	)	
VS.	)	
	)	Docket No. 214,766
BILL'S DOLLAR STORES	)	
Respondent	)	
AND	)	
	)	
LUMBERMEN'S UNDERWRITING ALLIANCE	)	
Insurance Carrier	)	

ORDER

Claimant appeals the Award entered by Administrative Law Judge Robert H. Foerschler on July 31, 1997. The Appeals Board heard oral argument January 20, 1998.

APPEARANCES

James M. Crowl of Topeka, Kansas, appeared for the claimant. Denise E. Tomasic of Kansas City, Kansas, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Appeals Board considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ limited claimant's permanent partial disability benefits to a 5 percent functional impairment. Claimant argues for a work disability award. Respondent contends claimant is not entitled to a work disability because she returned to work for respondent earning a comparable wage until she was terminated for cause. Thereafter, according to respondent, claimant failed to make a good faith effort to find appropriate employment. Respondent also contends claimant retains the ability to earn a comparable wage. The issues for Appeals Board review are:

(1) The nature and extent of claimant's disability.

(2) Whether claimant's treatment with Dr. Rory Hall should be paid as authorized medical treatment.

(3) Whether claimant is entitled to temporary partial disability compensation for the period of July 1, 1996 through August 5, 1996.

Respondent also raises an issue concerning whether claimant is precluded from receiving all benefits, except medical compensation, under K.S.A. 44-501(c) for the February 12, 1996 injury, and contends claimant has not proven what portion of her impairment is attributable to the April 11, 1996 accident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board has determined, for the reasons stated below, that the Award should be modified to a 60 percent work disability beginning July 1, 1996, the date claimant was terminated by respondent.

The ALJ's Award sets out findings of fact and conclusions of law in some detail. It is not necessary to repeat those findings and conclusions in this Order. The Appeals Board adopts the ALJ's findings and conclusions as its own as if specifically set forth herein, with the exception that the Appeals Board concludes claimant is entitled to a work disability commencing on the date of her termination by respondent.

Following her injuries on February 12, 1996 and April 11, 1996, claimant continued working for respondent but in an accommodated position. She was earning 90 percent or more of her pre-injury wage until July 1, 1996 when she was terminated due to complaints by customers.

The Kansas Court of Appeals has ruled that employees who refuse to accept reasonable employment are not entitled to benefit from the refusal by an award of work disability. Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). Employees terminated for misconduct or poor performance invoke similar policy considerations. *See* Perez v. IBP, Inc., 16 Kan. App. 2d 277, 826 P.2d 520 (1991). These decisions, however, presuppose an element of bad faith on the part of a claimant. Such was not evident here. To the contrary, claimant demonstrated a strong work ethic and employer loyalty by returning to work for respondent while injured and while still undergoing medical treatment for her injuries. Hence, the policy considerations announced in Foulk do not apply.

K.S.A. 44-510e(a) defines work disability as the average of the wage loss and task loss:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

K.S.A. 44-510e also provides that a claimant is not entitled to disability compensation in excess of the functional impairment so long as the claimant earns a wage which is equal to 90 percent or more of the pre-injury average weekly wage. The above statute, however, must be read in light of Foulk and Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997). In Copeland, the Court held that for purposes of the wage loss prong of K.S.A. 44-510e, a worker's post-injury wage would be based upon ability rather than actual wages when the worker failed to put forth a good faith effort to find appropriate employment after recovering from the injury. In this case, the Appeals Board finds that claimant made a good faith effort to find appropriate employment and that she did not refuse to work. Therefore, neither Foulk nor Copeland are appropriate to limit claimant's benefits to a functional impairment rating and claimant is entitled to a 100 percent wage loss beginning July 1, 1996. The Appeals Board also finds claimant has lost the ability to perform 20 percent of the tasks she performed in the relevant 15-year work history. This finding is based upon the opinions of Dr. Don B. W. Miskew and Dr. Steven L. Hendler. Accordingly, claimant has a 60 percent work disability based upon a 100 percent wage loss and a 20 percent task loss.

Respondent has not argued for a reduction of the work disability based on preexisting impairment but did argue claimant failed to prove what percentage of her impairment is due to the April 11, 1996 accident as opposed to the February 12, 1996 accident. Although this issue was not raised for the purpose of claiming a credit, respondent contends the record fails to establish what portion of claimant's functional impairment, and presumably what restrictions and resulting task loss, are attributable to the second accident. As both accidents occurred while claimant was working for respondent and both are included under this single docketed claim, the apportionment would not be relevant except that a disability award is precluded for the first accident by K.S.A. 44-501(c). The Appeals Board finds that claimant's second accident, which was to the same area of her body and more severe than the first, would have resulted in the same impairment and restrictions irrespective of the first accident. Therefore, the work disability is not affected by the applicability of K.S.A. 44-501(c) to the first accident.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Robert H. Foerschler dated July 31, 1997, should be, and is hereby, modified as follows.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Wetona M. Neisz, and against the respondent, Bill's Dollar Stores, and its insurance carrier, Lumbermen's Underwriting Alliance, for accidental injuries which occurred February 12, 1996 and April 11, 1996, and based upon an average weekly wage of $277.37 for 11.57 weeks at the rate of $184.92 per week or $2,139.52, for a 5% permanent partial general disability, followed by 237.43 weeks beginning July 1, 1996 at the rate of $184.92 per week or $43,905.56, for a 60% permanent partial general disability, making a total award of $46,045.08.

As of September 15, 1998 there is due and owing claimant 11.57 weeks of permanent partial compensation at the rate of $184.92 per week or $2,139.52, followed by 115.14 weeks of permanent partial compensation at the rate of $184.92 per week in the sum of $21,291.69 for a total of $23,431.21, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $22,613.87 is to be paid for 122.29 weeks at the rate of $184.92 per week, until fully paid or further order of the Director.

The treatment provided by Dr. Rory Hall from February 12, 1996 through May 1996 is ordered paid by respondent as authorized medical expense.

The Appeals Board also approves and adopts all other orders entered by the ALJ not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of September 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James M. Crowl, Topeka, KS
Denise E. Tomasic, Kansas City, KS
Robert H. Foerschler, Administrative Law Judge

Philip S. Harness, Director